

SCOTT HAMPSON

IBLA 74-279

Decided December 31, 1974

Appeal from decision of Oregon State Office rejecting, in part, right-of-way application (OR 9322) for pipeline.

Affirmed.

1. Rights-of-Way: Act of February 15, 1901 -- Water and Water Rights: Generally

It is within the discretion of the Bureau of Land Management to reject an application for a right-of-way for a pipeline to transport water from a spring on public land to private land for private use, where the public land is retained for wildlife purposes and the spring is essential to the wildlife because of critical summer water shortages.

APPEARANCES: Scott Hampson, pro se.

OPINION BY ADMINISTRATIVE JUDGE GOSS

Scott Hampson 1/ appeals from that part of a decision of the Oregon State Office, dated March 20, 1974, which rejects one of two right-of-way applications filed under the Act of February 15, 1901, as amended, 43 U.S.C. § 959 (1970) for pipelines to transport water from springs located on public land to private land. The southern right-of-way was granted as applied for.

On May 8, 1972, appellant and five other parties filed their application for two water pipeline rights-of-way in SW 1/4 SW 1/4 section 1, T. 36 S., R. 5 W., W. M., Josephine County, Oregon. They stated that the "primary purpose of the right-of-way is for storage of water in two spring boxes (both about two feet by six feet by six

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1/ The application for the rights-of-way was signed by Hampson and five other parties. Only Hampson's name appears on the notice of appeal and statement of reasons, although he does state that he is appealing the rejection of our northernmost right-of-way.

feet deep \* \* \* one spring box per spring) and conveyance by two pipelines, both 1 1/2 inches in diameter." The water was to be used primarily for irrigation on their adjacent property. They added that the rights-of-way appear to have been used traditionally for water supply to the property, as old water lines and an old spring box existed when they purchased the property October 1, 1971. They said they have made no additional improvements. 2/

In a memorandum to the District Manager, of February 21, 1974, the Area Manager, Northeast, explained that the springs in issue are tributary to the East Fork of Jones Creek, which dries up in the summer months. If the entire production of the two springs is appropriated, then wildlife during the summer months will not have access to any water source.

The District Manager's report of February 21, 1974, to the State Director includes the following evaluation by the Resource Manager:

The Land will be retained by the United States for timber, wildlife, watershed and recreational purposes. (Emphasis added.)

\* \* \* \* \*

Unit Resource Analysis and the Operations Inventory classify this as low value timber land. Its best potential is for watershed and wildlife purposes with small amounts of timber production to be utilized over a long rotation. (Emphasis added).

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Appropriation of water to man's exclusive use from both springs in this dry country means that a couple of the last known natural water sources for wildlife in the area is taken away during summer months.

Deer, raccoon, squirrels, skunks and other mammals as well as a variety of birds inhabit the countryside.

Man cannot expect to continue to reserve every natural spring to his exclusive use when it conflicts with the welfare of wild things.

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2/ In a September 28, 1973 memorandum, Wildlife Specialist Neitro stated that applicants had made improvements to the existing spring development. With both springs fully tapped, "little or no water has been left for wildlife."

Therefore, I conclude that both water sources should not be appropriated. Rather, one should be left untapped for the use of wildlife.

I recommend that the application be honored for a water pipeline to be constructed from the southernmost spring and that it be denied for the one to the north. I further recommend that the applicant be instructed to remove all improvements for transport of water from the northernmost spring which are placed there without authority.

On the basis of these recommendations, the State Director issued his decision rejecting the application for the existing pipeline traversing 169.94°N. 74 (degrees) 33' 30" W.

In his statement of reasons, appellant contends that there are other springs within 200 feet of the one applicants are using, supplying as much water for wildlife as their spring. However, appellant also claims the water from the spring is shallow and muddy and therefore not suitable for wildlife. He alleges that, in actuality, all wildlife uses the East Fork of Jones Creek for water, and that the creek is a year-round creek only 200 yards from the spring and right-of-way in question. Appellant states he has offered "to revise the spring box so as to provide an actual trough area for the watering of wildlife." The Neitro report, supra 2/, indicates that a storage tank would be desirable but subject to problems.

The record does not show that the position of appellant on the above matter was formally presented in detail to the office of the District Manager for consideration prior to the decision herein. For this reason, the appeal will be decided upon the basis of the application before the Bureau; however, the decision is not intended to preclude appellant's filing a further and more detailed application as discussed infra.

[1] An application for a right-of-way, the approval of which would be inconsistent with the public interest, will be rejected. 43 CFR 2802.2-1. Preservation of water for wildlife, in an area retained for wildlife purposes, is in the public interest. Appellant contends that Jones Creek provides a year-round source of water for wildlife, but presents no authoritative proof; the Bureau states that the creek dries up during the summer months and other sources of water are necessary. The Bureau has determined that the water from one spring in the area may be appropriated for private use without an adverse effect on wildlife. It predicts, however, that if the water from both springs is appropriated to private use, wildlife will suffer. Given these findings, based on a field investigation of the area, the Bureau decision to grant one right-of-way and reject the other is proper. We conclude that it was within the discretion of the District

Manager to reject an application for a right-of-way for a pipeline to transport water from a spring on public land to private land, for private use, where the public land is retained for wildlife purposes and the spring is essential because of critical summer shortages of water. See William A. Lester, 2 IBLA 172 (1971).

In any amended application in connection with the right-of-way hereby denied, appellant should show: (1) that the proposed drinking trough would be so constructed that it could be physically utilized by wildlife even during the water-short months, (2) the amount of water which would constantly be reserved for use of wildlife and (3) whether the East Fork of Jones Creek is a year-round creek and the specific location of any other springs nearby.

Appellant's group is granted 60 days in which to file the above-described amended application. If it does so, it will not be required to remove its improvements until the application is acted upon. If the application is rejected, removal must be completed within 10 days from the date the decision becomes final. If its improvements are removed, the group must restore the land to the condition in which it found it, to the satisfaction of the authorized officer. Improvements not removed, within the time allowed by said officer, will be presumed the property of the United States. Such removal will not vitiate any trespass liability of applicants under 43 CFR 2801.1-4.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision of the State Office is affirmed.

Joseph W. Goss  
Administrative Judge

We concur:

Frederick Fishman  
Administrative Judge

Martin Ritvo  
Administrative Judge

